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Supreme Court of the United States

OCTOBER TERM—1957.

No. 461

McALLISTER LIGHTERAGE LINE, INC.,

Petitioner (Plaintiff Appellee Below),

vs.

INSURANCE COMPANY OF NORTH AMERICA, and SCOTT PAPER COMPANY,

Respondents (Defendants Appellants Below).

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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McALLISTER LIGHTERAGE LINE, INC.,
Petitioner (Plaintiff Appellee Below),

vs.

INSURANCE COMPANY OF NORTH AMERICA; and SCOTT PAPER COMPANY,
Respondents (Defendants Appellants Below).

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

The Petition of McALLISTER LIGHTERAGE LINE, INC., respectfully shows:

A.

Citation of Opinions Below.

The opinion of the United States District Court for the Southern District of New York is reported at 143 F. Supp. 697, and is at page 94a of Appellants' Appendix.

The opinion of the United States Court of Appeals for the Second Circuit is reported at 244 F. (2d) 867.

B.

The Jurisdiction of This Court.

(i) The Judgment of the United States Court of Appeals for the Second Circuit is dated May 29th, 1957, and was entered the same day.

(ii) The order of the Court of Appeals denying the petitions for rehearing by defendant SCOTT PAPER COMPANY and petitioner, and amending the opinion is dated and was filed on June 20th, 1957.

(iii) The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1), Act of June 25th, 1948, c. 646, 62 Stat. 928.

C.

The Questions Presented.

Whether the Court of Appeals for the Second Circuit erred

(a) in reversing a jury's verdict against the defendant Insurance Company and dismissing the complaint against that defendant because the Court drew an inference from the evidence that petitioner's vessel was unseaworthy, contrary to the conclusion drawn by the jury that she was seaworthy (at the inception of the policy), two conflicting inferences being possible;

(b) (With respect to the defendant Scott Paper Company) in holding that, although the action against Scott Paper Company was based upon a written agreement providing that said defendant would maintain plaintiff's vessel and return her to plaintiff in the same condition as when received at the commencement of the charter period, the tort

rule of damages measures the liability of that defendant merely because the proof showed that the damage which said defendant failed to repair was caused by the negligence of that defendant's employees, thus relieving the defendant of the burden of proving that plaintiff failed to mitigate its damages resulting from the breach of the contract and thereby reducing plaintiff's recovery.

Statement of the Case.

Petitioner entered into a written agreement with respondent Scott Paper Company (hereinafter called "Scott"), Exhibit A (A1, 9a*), under which Scott chartered and hired from petitioner on a bareboat basis for one year, the wooden deck scow *McAllister No. 58* (a vessel without motive power). The agreement further provided that the vessel was to be "maintained by charterer and shall be returned to owner in the same condition as it was at the commencement of this charter * * *". The sixth article of the contract required Scott to provide marine insurance coverage for the benefit of Scott and petitioner.

On August 25th, 1953, Scott accepted delivery of the vessel at Wilmington, Delaware, petitioner having towed her there from New York by way of the Atlantic Ocean. While the vessel was en route to Wilmington, Scott arranged marine insurance with respondent Insurance Company of North America (hereinafter called "Insurance Company") to attach August 26, 1953 (A1, 17a-18a), by adding the vessel to a term policy covering other vessels of Scott (Ex. 1, R. 77). After arrival at Wilmington, two experienced employees of Scott made thorough examinations of the scow, without reporting any defects (A1, 29a;

* A1 Refers to Appellants' Appendix; A2 refers to Appellee's Appendix. References are to pages.

A2, 108a). Scott caused the scow to be loaded and then taken in tow by a tug for movement to Chester, Pa. Contrary to orders which required him to accompany the scow during the towage, Scott's employee Church failed to remain aboard.

During the towage the tug crew observed leakage and thereafter because the leakage was not pumped out, the scow capsized. It was the duty of the Scott employee who absented himself from the scow contrary to orders to discover leakage and pump the leaking water, the vessel being equipped with three pumps for that purpose.

Subsequent examination in drydock disclosed that some caulking material was hanging loosely from a small space between two planks designed to hold the caulking material and there was opinion evidence that the sinking was due to water which entered through such opening. There was undisputed evidence that all water which might enter through that opening could have been easily controlled by only one of the vessel's three pumps. There was also undisputed evidence that at its inception the leakage would have been inconsequential and should have been discovered during the course of loading. It could have been effectively, although temporarily, repaired by the insertion of a wedge or other material in the small opening and, if necessary, the loading of the vessel could have been stopped before the leak reached dangerous proportions. If not stopped, by plugging, the leakage could have been controlled by the pumps before the water rose to a dangerous height within the vessel. Attention to all these matters was the duty of the employee of defendant Scott, designated as captain or master, who, in breach of his orders, did not remain aboard the vessel.

The surveyor for the Insurance Company of North America admitted that the condition of the caulking constituted a "latent defect" and that if the vessel's master

(Scott's employee) had been present, the sinking in the opinion of the witness would not have occurred.

Besides the usual maring perils the policy afforded coverage against loss directly caused by "any latent defect in the machinery or hull" and "negligence of master • • • mariners, engineers or pilots".

Following the sinking the representatives of all parties agreed that the cost of repairs was $23,456.19 (A1, 56a). Despite the obligation of clause 5 of the charter to maintain the scow and return her to petitioner at the end of one year in the same condition as at the commencement of the charter, Scott did not make the repairs and returned her to petitioner in damaged condition on September 24, 1953 (A2, 144a, 145a). The Insurance Company did not pay petitioner or Scott under the insurance policy.

The Litigation.

The action was commenced in the Supreme Court of the State of New York, New York County, but was removed by respondents to the United States District Court, Southern District of New York, because of diversity of citizenship. Respondents, represented by the same attorneys, filed a joint answer.

On respondents' request, special questions were submitted, by the answers to which the jury found that:

> The loss of the scow was not proximately caused by negligent failure to complete her caulking prior to her delivery to Scott (A1, 85a; Amended Judgment, A1, 102a).
>
> It was proximately caused by negligence of Scott's employees subsequent to the delivery of the scow to Scott (A1, 85a, 102a).
>
> The reasonable cost of repairs and other expenses due to the sinking was $23,456.19 (A1, 85a, 102a).

The scow was not unseaworthy when the Insurance Company issued its policy endorsement (A1, 86a, 102a).

Petitioner's employees were reasonably justified in representing to the Insurance Company on August 26, 1953, that the scow was seaworthy (A1, 86a, 103a).

The market value of the scow was $20,000 (A1, 86a, 102a).

The jury awarded a verdict against respondent North America of $20,000, and against respondent Scott for $3,456.19 (A1, 85a, 103a) (the difference between the amount of the Insurance Company's liability and the cost of repairs which Scott had contracted to make).

Judge Albert L. Reeves' opinion denying the motion for a new trial appears at pages 94a to 98a of Appellants' Appendix.

The Court of Appeals reversed the judgment below, and directed entry of judgment against Scott for $20,000, and dismissal of the complaint against The Insurance Company of North America.

Both parties filed petitions for rehearing, which were denied, but the opinion was amended.

Reasons for Allowance of the Writ.

Marine insurance is an all-important part of the shipping industry of the United States. All branches of the shipping industry are vitally concerned with the question whether a jury's determination of the issue of seaworthiness may be upset by a Court, merely because the Court draws inferences from evidence contrary to those reasonably drawn by the jury. If a Court may upset a jury's fact finding of seaworthiness in a case involving insurance, it may do so in cases involving personal injuries, charters,

cargo damage and any other of the various phases of shipping litigation.

The shipping industry as a whole is interested in the question whether a contract to hire a vessel for one year and make all repairs necessary to maintain the vessel during that period may be breached by a party within a few days after the delivery of the vessel, without subjecting such party to all damages flowing from the breach of the contract, merely because negligence of the defaulting party preceded its breach.

Amplification.

Conflicting Inferences From the Evidence Being Possible, the Court of Appeals Erred in Upsetting the Jury's Special Fact Finding That the Scow Was Seaworthy at the Inception of the Policy.

As this Court said in *Schulz* v. *Pennsylvania R. Co.*, 350 U. S. 523, 524, 100 L. Ed. 668, 670:

> "• • • The Seventh Amendment to the Constitution provides that 'the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.' • • •"

The Court of Appeals based its overturning of the jury's verdict upon a conclusion that leakage nearly equal to the pumping capacity during a voyage and after loading is conclusive evidence that the scow was unseaworthy at an *earlier* time. The jury concluded from all the evidence that the boat was seaworthy when the insurance attached on August 26, 1957 (A1, 86a, 102a), and that she became unseaworthy thereafter and required capacity pumping

only because the captain had negligently allowed a discoverable condition to increase in seriousness until it reached a state of unseaworthiness.

We submit the jury was to decide.

Obviously more than one inference may be drawn from the evidence, otherwise the jury and the Court would not have drawn conflicting ones. In that situation it is proper to submit the question to the jury. *Ferguson* v. *Moore McCormack Lines, Inc.*, 352 U. S. 521, 1 L. Ed. 2d 511.

That the issue was one of fact was recognized by counsel for the Insurance Company in requesting the Court to submit the special question to the jury.

We submit that seaworthiness at a given time does not depend upon events which subsequently happen to the vessel. It depends upon the condition at the time.

In its opinion as originally handed down, the Court of Appeals said (slip opinion, p. 1548):

> "The warranty of seaworthiness attaches when the vessel breaks land. *The Steel Navigator, supra.* She is seaworthy or unseaworthy at the start of her voyage.
>
> This unseaworthiness of the '58' precludes recovery from North America on the policy,"

The Court amended its opinion to state (244 F. 2d 867, at 870) that:

> "With a term policy of insurance the warranty of seaworthiness arises at the time when the insurance becomes effective. See Union Co. *v.* Smith, 1888, 124 U. S. 405, 8 S. Ct. 534, 31 L. Ed. 497; and Henjes *v.* Aetna Insurance Co., 2 Cir., 1943, 132 F. 2d 715, certiorari denied 319 U. S. 760, 63 S. Ct. 1316, 87 L. Ed. 1711. Here the insurance became effective on August 28, when the scow was at the Scott pier in Wilmington. The scow did not begin her first voyage for Scott until the evening of the following day."

While only about twenty-four hours elapsed between the date of attachment and the commencement of the voyage, the distinction is important. Any unseaworthiness unquestionably developed after the date of attachment.

There is a sharp distinction between a policy of insurance for a voyage and one for a fixed period of time (term policy). In a voyage policy the vessel must be seaworthy at the commencement of the voyage.

> "With a term policy of insurance the warranty of seaworthiness arises at the time when the insurance becomes effective" (*supra*).

The statement that "This unseaworthiness of the 58 precludes recovery from North America on the policy," which appeared in the opinion before amendment obviously referred to the statement that "The warranty of seaworthiness attaches when the vessel breaks land." It still remains in the opinion as amended but now seems inapplicable.

It would appear that having amended its opinion by changing the time of unseaworthiness under the term policy here involved, from the time of breaking land to the time when the policy became effective, "when the scow was at the Scott pier in Wilmington" the Court of Appeals should have held the Insurance Company of North America liable, and affirmed the judgment against it for $20,000.

The Action Against Scott is One for Breach of Contract and the Rules Governing Damages in Contract Actions Apply.

The Court of Appeals said (244 F. 2d 872):

> "the complaint and the entire thrust of the case is one of negligence and the relationship of the parties is, therefore, irrelevant."

It is respectfully submitted that the Court of Appeals probably confused the nature of the action with the rules of pleading and of evidence.

An action for breach of a charter provision is clearly one for breach of contract as it is well settled that a charter is a contract.

At 58 C. J. p. 106, §149, it is stated that

> "A charter party is a specific contract, by which the owners of a vessel let the entire vessel, or some principal part thereof, to another person, to be used by the latter in transportation for his own account, either under their charge or his, and has often been called a 'mercantile lease'" (citing cases).

Vandewater v. *Mills* (1857), 60 U. S. (19 How.) 82, 15 L. Ed. 554, 557;

Ward v. *Thompson* (1859), 63 U. S. (22 How.) 330, 16 L. Ed. 249;

Jones & Laughlin Steel Corp. v. *Vang* (3 C. C. A. 1934), 73 F. 2d 88, certiorari dismissed 294 U. S. 735, 79 L. Ed. 1263.

An action for damage negligently done to a barge while on charter to the United States is an action for breach of contract and may be properly brought under the Tucker Act.

Berwind-White Coal Mining Co. v. *United States* (S. D. N. Y., 1925) 1925 A. M. C. 1313, reversed on other grounds 15 F. (2d) 366;

Crouch v. *United States* (D. C., E. D., S. C., 1928), 31 F. (2d) 211, 212.

In actions for damages for breach of charter, the plaintiff or libellant must both *plead* and *prove* negligence on the part of the defendant or respondent.

In *Alpine Forwarding Co.* v. *Pennsylvania Railroad Co.* (2 C. C. A. 1932), 60 F. (2d) 734, certiorari denied 287 U. S. 647 (1932, No. 380), a contract action on bailment, the Circuit Court of Appeals held that it was necessary not only to prove the bailee's negligence but to plead it.

Petitioner, as it was obliged, in its complaint pleaded, and on the trial proved, negligence. While "the complaint and the entire thrust of the case" might have led the Court of Appeals to believe that it was an action for negligence, it was in fact one for breach of contract, and the rules governing damages in contract actions apply.

There is no question that in tort cases the tort feasor's liability for the cost of repairs should not exceed the value of the vessel. However, such rule has no application in an action for damages for breach of contract. Here respondent Scott failed to perform its contractual undertaking, which was (Exhibit A, A1, 10a):

> "5. Said scow is to be maintained by charterer and shall be returned to owner in the same condition as it was at the commencement of this charter as evidenced by the report of the aforesaid ingoing survey, less ordinary wear and tear, provided, however, that if the term of this charter shall be extended for a period of one year * * *."

Plainly this contract provision imposed upon Scott the obligation to maintain the scow so that she could continue working under the charter agreement and earn for her owner the agreed monthly hire, or at least to pay the monthly hire and at the end of one year return the vessel to the owner in the same condition as when received. Scott admitted, by its answers to interrogatories, that before the end of the term it returned the *No. 58* to petitioner in a con-

dition other than when received and so damaged that the repair would cost $23,456.19 (A1, 56a, A2, 144a, 145a). In other words, Scott admits a breach of its contract.

The case is not the same as the familiar New York Harbor oral charter under which, as has been held many times, the charterer's responsibility depends upon a breach of its non-delegable duty of care. Such charters do not impose on the hirer the obligation to furnish and pay the crew, and to provide all victuals, lines, stores, supplies and equipment required, and to maintain the vessel for a period of a year or more, such as Scott assumed under the contract here.

Accordingly, the damages which petitioner is entitled to recover from Scott are those resulting from Scott's breach of its contract to maintain the vessel and return her at the end of one year in the same condition as when received. Scott admits that the cost of restoring the *No. 58* to that condition was $23,456.19 (A2, 144a-145a). Of this latter amount, however, petitioner by the jury's verdict was to recover $20,000 from the Insurance Company, the balance from Scott.

In an action for damages for breach of contract the burden rests upon the defendant to show that the plaintiff failed to minimize the damages resulting from the breach.

> *Finberg Trading Co.* v. *Republic of China*, 220 F. (2d) 844, 846;
> *Standard Growers' Exchange* v. *Hooks*, 22 F. (2d) 599, 600;
> *Lillard* v. *Kentucky Distillers, etc.*, 134 Fed. 168, 171.

The New York rule is the same. *Losei Realty Corp.* v. *City of New York*, 254 N. Y. 41, 48.

WHEREFORE, petitioner prays that a writ of certiorari be granted, and the proceedings reviewed by this Court.

McALLASTER LIGHTERAGE LINE, INC.,
Petitioner,

By CHRISTOPHER E. HECKMAN,
Counsel.

CHRISTOPHER E. HECKMAN,
Counsel for Petitioner,
64 Wall Street,
New York 5, N. Y.

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

No. 145—OCTOBER TERM, 1956.

(Argued January 18, 1957 Decided May 29, 1957.)

DOCKET NO. 24295.

MCALLISTER LIGHTERAGE LINE, INC.,
Plaintiff-Appellee,

v.

INSURANCE COMPANY OF NORTH AMERICA and SCOTT PAPER COMPANY,
Defendants-Appellants.

Before:

MEDINA, HINCKS and LUMBARD,
Circuit Judges.

Appeal by defendants from amended final judgment entered upon the verdict of a jury, by Albert L. Reeves, *Judge*, sitting in the Southern District of New York. The Insurance Company of North America was held liable for $20,000 and Scott Paper Company for $3,456.19, for the foundering of plaintiff's scow "58" while under a demise charter to defendant Scott Paper Company. Reversed as to the Insurance Company of North America, and remanded for entry of judgment against Scott for $20,000.

FOLEY & MARTIN, New York, N. Y. (Christopher E. Heckman, of counsel on the brief), *for plaintiff-appellee.*

RAWLE & HENDERSON, Philadelphia, Pa., and Bigham, Englar, Jones & Houston, New York, N. Y. (Harrison

G. Kildare, Joseph W. Henderson and Richard F. Shaw, of counsel on the brief), *for defendants-appellants.*

PURDY, LAMB & CATOGGIO, New York, N. Y., *for defendant-appellant* Scott Paper Co.

LUMBARD, *Circuit Judge:*

Defendants appeal from a judgment entered upon the verdict of a jury by Albert L. Reeves, Judge, sitting in the Southern District of New York, in the amounts of $20,000 against the Insurance Company of North America and $3,456.19 against Scott Paper Company.

This action arose out of a charter of the *McAllister scow 58* to the Scott Paper Company in August 1953. McAllister delivered the *58*, a wood hull harbor scow built in 1911, to Scott at its Wilmington Marine Terminal on the evening of August 25, 1953. The following day McAllister and Scott executed a written demise charter of the scow for one year at $650 per month. The terms of the charter required Scott to furnish and pay the crew and furnish all victuals, supplies and equipment. Paragraph 4 of the charter provided: "The acceptance of said scow by the Charterer is to be conclusive evidence of the seaworthy condition of said scow at the commencement of this charter." The charter party required Scott at its expense to insure with full fire and marine insurance for the protection of owner and charterer "as interest may appear" in the sum of $20,000.

Just prior to the charter McAllister had drydocked the scow for an in-going survey at its expense, including the recaulking of the hull. On August 27 the scow was loaded with 605 short tons of wood pulp, a load well within the capacity of 700 tons. During the loading Scott's bargee, Samuel Church, found a small amount of water in the hull which he pumped out, before noon, with a gasoline pump aboard. Just before 6 P. M. he started the pump again to remove additional seepage. At 6:30 P. M. a tug proceeded to tow *58* toward the Scott plant at Chester, Pennsylvania,

about 14 miles away, going down the Christiana River for three quarters of a mile with a fair current and then north on the Delaware River with increased engine speed against the ebbing tide.

The *58* was unattended because Church did not remain aboard as he had been instructed, but instead drove along the shore. Off Claymont, Delaware about 8:30 P. M. the mate on the tug noticed that *58* was listing slightly and upon going aboard a few minutes later the tug's captain found water "bursting right in." Within a few minutes the scow's rail was under water and the tug beached *58* at the ice breaker above Marcus Hook. There she sank before Church, who meanwhile had arrived from shore, could hook up a pump.

The *58* was later refloated and upon inspection at the marine railway it was found that the caulkers, working for McAllister to repair and fit the scow according to the agreement between Scott and McAllister, had neglected to recaulk a seam 18 inches long in the bottom planking. Though the seam was uncaulked for a space of 18 inches, certain interior structures reduced the clear opening to 10 inches. This much is undisputed, and from this it seems clear that the residue of old oakum left by the outfitters "blew out" as the *58* started up the Delaware River. It is undisputed that it was through the resulting 10 inch opening the *58* filled with water and sank.

Scott and North America filed a joint answer alleging that the insurance never became effective because the scow contained a hidden defect which breached McAllister's implied warranty of seaworthiness, that Scott had no knowledge or means of obtaining information regarding the unseaworthy condition of the scow, and that it could not be and was not observed on reasonable and proper inspection. Secondly, it was alleged that paragraph 4 of the charter was inoperative, since it was intended to apply only to patent defects.

McAllister moved to strike the second defense on the ground that acceptance of the scow pursuant to paragraph 4 of the charter was conclusive evidence of seaworthiness,

and not restricted to patent defects. Judge Clancy granted the motion and struck the defense.

At the trial before Judge Reeves and a jury, McAllister sought to prove that the sinking was due solely to the negligence of Scott. It was urged that if the barge captain had remained aboard and run the pump, the scow would not have sunk, since the opening in the seam would admit only 4,419 gallons of water per hour and the pumps could handle at least 5,800 gallons per hour.

The jury's answers to written interrogatories submitted to it may be summarized as follows:

1. The loss of the scow was proximately caused by Scott's negligence after the scow's delivery.

2. The reasonable cost of repairs was $23,456.19, and the market value was $20,000.

3. The scow was not unseaworthy when the policy endorsement was issued on August 26, 1953.

4. McAllister made representations to North America on August 26 regarding the scow which North America was justified in accepting as an assurance that the scow was then in sound condition, and McAllister was justified in doing so. The jury returned a general verdict for the plaintiff for $20,000 against North America and $3,456.19 against Scott. Subsequently Judge Reeves entered judgment against North America for $20,000, the face amount of the policy, and for $3,456.19 against Scott.

North America moved for judgment notwithstanding the verdict, but this motion, as well as both defendants' motions for a new trial, were denied by Judge Reeves.

North America appeals alleging that error was committed by Judge Reeves in denying its motion for judgment n.o.v. since the scow was unseaworthy when the policy was issued, and this was a breach of the policy's implied covenant of seaworthiness. Scott's appeal alleges error in Judge Clancy's striking its second defense and on the ground that the judgment entered by Judge Reeves is not supported by the evidence and excessive.

The conceded facts show that the vessel was unseaworthy. Seaworthiness is the ability of a vessel adequately to perform the particular services required of her on the voyage she undertakes. *The Silvia*, 1898, 171 U. S. 462, 464, 19 S. Ct. 7, 43 L. Ed. 241; *The Southwark*, 1903, 191 U. S. 1, 24 S. Ct. 1, 48 L. Ed. 65; *The Steel Navigator*, 2 Cir., 1928, 23 F. 2d 590; *The T. J. Hooper*, 2 Cir., 1932, 60 F. 2d 737; *Ondovo* v. *Standard Oil Co.*, 2 Cir., 1954, 210 F. 2d 233. Here the *58* had an 18 inch slit in her bottom which had not been recaulked. True, when she set out on the voyage in question the hole was stoppered by the old oakum which the caulkers had failed to replace, but when the *58* was put to a normal test this residue "blew out" and the water rushed in. A vessel which requires constant pumping at virtually the capacity of her pumps in order to keep afloat is not seaworthy. Were it otherwise, seldom would a vessel be unseaworthy as it could always be said that her defects were curable by emergency measures.

The thrust of McAllister's case was that the vessel sank solely because of the negligence of Scott, in that Church's absence and his failure to man the pumps caused the damage. Though it may be true that vigilance by Church might have kept the *58* afloat, it does not relieve the owner from the obligation to deliver a seaworthy scow. *With a term policy of insurance the warranty of seaworthiness arises at the time when the insurance becomes effective. See Union Co.* v. *Smith*, 1888, 124 *U. S.* 405, 8 *S. Ct.* 534, 31 *L. Ed.* 497; *and Henjes* v. *Aetna Insurance Co.*, 2 *Cir.*, 1943, 132 *F.* 2d 715, *certiorari denied* 319 *U. S.* 760, 63 *S. Ct.* 1316, 87 *L. Ed.* 1711. *Here the insurance became effective on August* 28, *when the scow was at the Scott pier in Wilmington. The scow did not begin her first voyage for Scott until the evening of the following day.**

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* The italicised portion is the amendment of the original which stated that

> "The warranty of seaworthiness attaches when the vessel breaks land. *The Steel Navigator, supra.* She is seaworthy or unseaworthy at the start of her voyage."

This unseaworthiness of the *58* precludes recovery from North America on the policy. *Richelieu & Ontario Nav. Co.* v. *Boston Marine Ins. Co.*, 1890, 136 U. S. 408, 10 S. Ct. 934, 34 L. Ed. 398; *New Orleans, T. & M. R. Co.* v. *Union Marine Ins. Co.*, 5 Cir., 1923, 286 F. 32; Gilmore and Black, The Law of Admiralty (1957) page 57ff. It is clear that implied in every policy of hull insurance is a covenant of seaworthiness. *The Caledonia*, 1895, 157 U. S. 124, 131, 15 S. Ct. 537, 39 L. Ed. 644; *Henjes* v. *Aetna Ins. Co.*, 2 Cir., 1943, 132 F. 2d 715, 719, certiorari denied 1943, 319 U. S. 760, 63 S. Ct. 1316, 87 L. Ed. 1711.

Nor is North America bound by Scott's acceptance of the scow and the provision in the charter making acceptance "conclusive evidence" of seaworthiness, for this provision was entirely unknown to the insurer. On these undisputed facts it was error to leave this question of unseaworthiness to the jury. Furthermore that North America never had any intention of waiving the implied warranty of seaworthiness is further shown by the proof of the inquiries which North America made prior to insuring the scow. The jury found, in answer to a special interrogatory, that McAllister had expressly warranted in conversation with North America's representative, the seaworthiness of the scow. Captain Hansen, the marine surveyor for North America, on request of the underwriter, telephoned McAllister to ascertain the scow's condition before she was accepted as a risk. McAllister's representative assured Captain Hansen that she was in sound condition. Clearly the purpose of the inquiry was to obtain information about the condition of the scow before placing the insurance, and this was known to McAllister's employee. No other source of information was available to the insurance company, as the vessel was then in Wilmington being loaded, and the company acted reasonably in relying on this warranty. *Sun Mutual Ins. Co.* v. *Ocean Ins. Co.*, 1883, 107 U. S. 485, 510, 1 S. Ct. 582, 27 L. Ed. 337.

The unseaworthiness of the *58* was a breach of an express warranty of the same nature as the law implies where nothing is expressly stated. Thus the policy of insurance was rendered void, and the motion for judgment n.o.v. made by the insurance company should have been granted.

We come now to the appeal from the judgment entered against Scott. Paragraph 4 in the charter agreement drawn by McAllister and accepted by Scott reads:

> "The acceptance of said scow by charterer is to be conclusive evidence of the seaworthy condition of said scow at the commencement of this charter."

In view of this clause, Judge Clancy granted the plaintiff's motion to strike from Scott's answer the defense of unseaworthiness, holding that the language was unambiguous and that it constituted a complete waiver of the warranty of seaworthiness. Scott contends on the other hand, that this waiver should be construed to apply only to latent or hidden defects.

The general rule is that a warranty of seaworthiness attaches to every charter. But the parties to a contract of private carriage are free to bargain as they please, and the warranty will not be implied where it is waived, as Judge Clancy correctly found here, in "plain and unequivocal" terms. *Dempsey v. Downing*, 4 Cir., 1926, 11 F. 2d 15; *Jordon, Inc.* v. *Mayronné Drilling Mud, etc., Service*, 5 Cir., 1954, 214 F. 2d 410.

And the finding of the jury that Scott was negligent and that the loss was due to this negligence finds adequate support in the evidence. Church was ordered to remain aboard the *58* precisely to prevent the type of damage which actually occurred. In leaving her he breached this duty and for this breach Scott is responsible. The jury was justified in concluding that if Church had remained aboard the *58* she would not have sunk. There was evidence that a hole such as appeared in the seam of the scow could easily be stoppered either with a rag or with a wooden wedge. Furthermore, the pumps aboard the *58* could have handled the leak had they been started in time and the vessel would have remained afloat. Thus Scott's liability is clear.

But the judgment as to Scott must be reversed because of the error of the district court in its award of damages. The jury in response to special interrogatories found that

the market value of the *58* was $20,000 and that the reasonable cost of repairs was $23,456.19, holding North America for $20,000, the face amount of the policy issued to cover the scow; and Scott for the $3,456.19 excess.

The object of the award of damages is to restore the injured party to the same position he held before the injury. *O'Brien Bros. Inc.* v. *The Helen B. Moran*, 2 Cir., 1947, 160 F. 2d 502. Thus the customary measures of damages to be awarded for the total loss of a vessel is the market value of the vessel at the time of destruction. *Standard Oil Co. of New Jersey* v. *Southern Pacific Co.*, 1924, 268 U. S. 146, 45 S. Ct. 465, 69 L. Ed. 890. The plaintiff-appellee admits this, but argues that this rule applies only to cases sounding in tort, and is inapposite here, because of the contractual relationships that obtained between the parties. The argument lacks merit for the complaint and the entire thrust of the case is one of negligence and the relationships of the parties is, therefore, irrelevant.

On the other hand, Scott argues that the jury's finding of the $20,000 market value of the *58* is not supported by the evidence. Captain Hansen, the insurer's marine surveyor, testified that the scow was worth only $7,500. On the other hand the evidence showed that the rental value of the scow was $7,800 per year; the insurance value, agreed upon by the parties, was $20,000; and the reasonable cost of repairs, as found by the jury, was $23,456.19. The jury was justified in rejecting Hansen's testimony and finding that the market value was $20,000.

The record is complete and the jury findings specific, so that a new trial would serve no gainful purpose. Accordingly, we reverse the judgment, and direct entry of judgment against Scott for $20,000, and dismissal of the complaint against North America, with costs to North America.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1957

No. 461.

McALLISTER LIGHTERAGE LINE, INC.,

Petitioner,

v.

INSURANCE COMPANY OF NORTH AMERICA AND SCOTT PAPER COMPANY,

Respondents.

BRIEF ON BEHALF OF INSURANCE COMPANY OF NORTH AMERICA IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

COUNTER-STATEMENT OF QUESTION PRESENTED.

The sole question presented by the Petition with regard to Insurance Company of North America is whether the Court of Appeals for the Second Circuit erred in finding, upon undisputed evidence which involved no conflicting inferences, that the insurance carrier's liability should not have been submitted to the jury.

COUNTER-STATEMENT OF THE CASE.

Petitioner, as owner of Scow 58, agreed with Scott Paper Company, the other Respondent, to recaulk the vessel as part of the reconditioning required to fit her for use under the charter party with Scott Paper Company (18a, 27a).* After drydocking, petitioner towed the scow from

*. Refers to pages in Appellant's Appendix as filed in the Court of Appeals.

New York to Wilmington, Delaware, where the vessel was delivered to the charterer on the night of August 25, 1953 and loading began the following day. While the first lot of wood pulp was being loaded, the charterer requested Insurance Company of North America to extend its hull policy to cover Scow 58.

On August 26, 1953 a representative of the insurance carrier was assured by petitioner that the scow was seaworthy. See Jury's answer to Special Interrogatory 4a (86a). The policy endorsement accordingly was issued that day and attached at once.

The evidence is uncontradicted and indisputable that the vessel was unseaworthy at the time of Petitioner's warranty, and it is not susceptible (as Petitioner urges) to conflicting inferences which must be resolved by a jury.

The uncontradicted factual evidence shows the following facts:

Loading was completed on August 27, 1953. While the scow was being towed by tug on her first trip from Wilmington Marine Terminal to charterer's plant at Chester, Pennsylvania, on the Delaware River she suddenly filled and sank when only a few miles from her starting point. The weather was clear, the water was calm, and the tug master testified that *nothing unusual occurred to account for the sinking* (24a).

Shortly after the scow was raised and placed in drydock at Camden, New Jersey, it was surveyed by representatives of petitioner and the respondents. They found an open seam 18 inches long which caused the sinking (41a, 42a). Tails of oakum were still hanging down at each end of the gap. This is a characteristic precaution employed by caulkers to locate spots where they cannot then finish a seam due to the interference of the "dock blocks" which support such vessels in drydock (44a-48a), but which are intended to be completed when the vessel is later shifted on the blocks.

Respondent's surveyor, Capt. Hansen, testified, without contradiction, that the caulkers had scraped out the old caulking from the seam, shaped like an inverted "Y" (40a), leaving a residue in the narrow upper section, and neglected to recaulk the flare (46a, 48a), and particularly that the residue of oakum concealed the defect until the scow was loaded and subjected to normal stresses of towing, saying:

> "There was undoubtedly or unquestionably a residue of oakum and cotton in that seam where the oakum had been reaved out, and that portion of the seam had not been recaulked. On the way down to Wilmington that residue remained in place and continued to remain there during the voyage and while it was in Wilmington being loaded. And it was after the boat received its cargo and was subjected to the pressure, the increased pressure of water against that portion of the seam, that that residue of oakum eventually blew out and water entered the boat through that open seam." (49a, 50a)

Petitioner did not call any witness to contradict Capt. Hansen, and has not disputed the accuracy of his testimony on that point.

Respondent Insurance Company of North America moved for a directed verdict in its favor on the ground that the conceded facts established beyond question that when the policy endorsement attached the scow was actually unfit to perform her contracted services, and hence unseaworthy. This motion was denied, and, following the verdict against the insurance carrier for the full amount of its policy, a motion for judgment non obstante veredicto was filed and subsequently refused by the trial judge.

The Court of Appeals found that the uncontradicted evidence clearly proved the petitioner's breach of its warranty of seaworthiness, and directed dismissal of the complaint against the insurance carrier.

ARGUMENT.

I. The Court of Appeals Exercised Proper Discretionary Power in Dismissing the Action.

The authority of the Court of Appeals to enter judgment notwithstanding the jury's verdict at the trial has been recognized by this Court on numerous occasions, subject only to the timely filing of a motion for judgment non obstante veredicto by the appellant at the close of the trial as required by Rule 50(b) of the Federal Rules of Civil Procedure. *Cone v. West Virginia Pulp & Paper Co.*, 330 U. S. 212 (1947); *Globe Liquor Co. v. San Roman*, 332 U. S. 571 (1948); *Fountain v. Filson*, 336 U. S. 681 (1949); and *Johnson v. New York, N. H. & H. R. Co.*, 344 U. S. 48 (1952).

Motion for judgment non obstante veredicto was filed by the insurance carrier in the present case (87a).

Where the evidence is so conclusive that the trial judge should have granted judgment non obstante veredicto, the Court of Appeals has full discretionary power to reverse the judgment and dismiss the action.

In *Montgomery Ward & Co. v. Duncan*, 311 U. S. 243 (1940), this Court gave guiding directions in applying Rule 50(b), pointing out at page 253 that "* * * the courts should so administer the rule as to accomplish all that is permissible under its terms." Referring to this passage in *Johnson v. New York, N. H. & H. R. Co., supra*, at page 56, it was stated that "This attitude was made specific by the statement that if the trial judge rules, as he properly should, on alternative motions for judgment n.o.v. and for a new trial, and denies them both, the appellate court may reverse the former action and direct the entry of judgment n.o.v."

In *Zientek v. Reading Co.*, 220 F. (2d) 183 (C. A. 3, 1955), the appellate court concluded by stating:

"Since there was no evidence upon which a jury could have found that appellee was a crew member of any vessel the judgment below will be reversed with directions to dismiss the action."

In the present instance, the Court of Appeals did not substitute its own inferences for those of the jury, but recognized that, on the basis of the undisputed evidence, no question remained for the jury to decide in respect to the unseaworthy condition of Scow 58 and Petitioner's breach of its warranty.

II. There Is No Reason for Review.

In exercising the authority granted by Rule 50(b) the action of the Court of Appeals presents no question for review by this Court. Its decision was based upon the specific facts contained in the testimony. There is no conflict with decisions in its own or other courts, either state or federal; the law involved is well settled; and there has been no departure from the accepted and usual course of judicial proceedings.

Petitioner urges review on the vague generality that the shipping industry is concerned with the result of setting aside a jury verdict. The assumption is unwarranted and there is manifestly no such concern. On the contrary, where in a case like this (in which the evidence was insufficient to make out an issue for the jury) the shipping industry, as well as all other businesses, should, and do, appreciate the protection of their rights afforded by an appellate tribunal acting under law, as the Court below has done herein. A jury's verdict does not possess such an aura of sanctity that it cannot be set aside when the facts warrant such reversal, as this Court has often recognized. *Cantey v. McLain Line, Inc.*, 312 U. S. 667, 1941 A. M. C. 657; *Norton v. Warner Co.*, 321 U. S. 565, 1944 A. M. C. 337; and *Desper v. Starved Rock Ferry Co.*, 342 U. S. 187, 1952 A. M. C. 12.

CONCLUSION.

It is, therefore, respectfully submitted that the Petition should be denied, at least as to Respondent Insurance Company of North America.

Respectfully submitted,

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